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IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1972

No. _____

SPENCER O. WALKER and RUBEN IVERY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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TABLE OF CONTENTS

Opinions Below 1
Statement of Jurisdiction 2
Question Presented for Review 2
Constitutional Provision Involved 2
Statement of the Case 3
Statement of Facts 5
Manner in Which Federal Question Was Raised 7
Argument in Support of Reasons for Allowance of Writ 8
Conclusion 11
Certificate of Service 11
Appendix A—Opinion Entered January 11, 1972 ..... A1
Appendix B—Order Denying Petition for Rehearing A5
Appendix C—Judgment A6
Appendix D—Appellants' Petition for Rehearing A7
Appendix E—Order Granting Motion for Stay of Mandate A15

Table of Authorities

CASES

Kotteakos v. *United States*, 328 U. S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) 8, 9, 10
Monroe v. *United States*, 234 F. 2d 49 (D.C. Cir. 1956) .. 7, 10

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SPENCER O. WALKER and RUBEN IVERY,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners, Spencer O. Walker and Ruben Ivery, respectfully show:

OPINIONS BELOW

The opinion below was rendered by the Fifth Circuit Court of Appeals in *United States of America* v. *Spencer O. Walker and Ruben Ivery,* No. 71-2165, and entered on January 11, 1972. A copy of said opinion is appended hereto as Appendix "A". The Petition for Rehearing was denied on February 29, 1972, without an opinion. A copy of the denial of the Petition for Rehearing is appended hereto and marked Appendix "B".

STATEMENT OF JURISDICTION

The Judgment of the Fifth Circuit Court of Appeals herein sought to be reviewed was rendered and entered on January 11, 1972. A copy of this Judgment is appended hereto as Appendix "C".

A Petition for Rehearing was denied by the Court of Appeals for the Fifth Circuit on February 29, 1972, and a copy of that Order is appended hereto as Appendix "B". Within thirty (30) days thereafter this Petition was filed.

Jurisdiction of this Court to review the Judgment in question is conferred by 28 U.S.C. Section 1254 (1) in that petitioners were defendants in a criminal case in the United States District Court for the Middle District of Georgia and the Court of Appeals for the Fifth Circuit has affirmed the Judgment of that Court which was adverse to the petitioners.

QUESTION PRESENTED FOR REVIEW

I.

Was it error for the Court below to affirm the conviction of petitioners when the indictment charged them with one general conspiracy and the proof offered at trial conclusively showed three or more separate conspiracies.

CONSTITUTIONAL PROVISION INVOLVED

I.

The Fifth Amendment to the Constitution of The United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when

in actual service in time of war or public danger; nor jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S.C.A. Constitution Amendments 1 to 5 at p. 297.

STATEMENT OF THE CASE

On December 10, 1970, a Grand Jury for the Middle District of Georgia returned a one count indictment against the appellants Spencer Walker and Ruben Ivery. (R. 3) The indictment charged the appellants with conspiracy to defraud the United States Government by manufacturing, distilling, transporting distilled spirits on which the tax had not been paid in violation of 18 U.S.C. Section 371. (R. 4) The indictment charged the appellants with conspiracy to possess unregistered stills which is a violation of 26 U.S.C. Section 5601 (a)(1); conspiracy to engage in the business of distillers of liquor without giving bond in violation of 26 U.S.C. Section 5601 (a)(4); conspiracy to conceal quantities of distilled spirits on which the tax had not been paid in violation of 26 U.S.C. Section 7206 (4). (R. 4)

On January 7, 1971, the appellants Spencer Walker and Ruben Ivery entered pleas of not guilty to the charges alleged in the indictment. (R. 9, 10) Counsel for appellants made a motion for judgment of acquittal at the close of the government's presentation of evidence, the motion was denied. (R. 560-62)

The jury, on February 5, 1971, returned a verdict of guilty as to both the appellants, and the appellant Ivery received a two year penitentiary sentence. (R. 565-67)

The appellant Walker received a four year penitentiary sentence, both were released on bond pending the disposition of their Motion for New Trial and appeals. (R. 569) On June 8, 1971, the Court denied appellants' Motion for New Trial. (R. 576) Notice of Appeal was filed by the appellants within the time prescribed by law. (R. 576)

On January 11, 1972, the United States Court of Appeals for the Fifth Circuit affirmed the Judgment of the Lower Court, and rendered the Opinion appended hereto as Appendix "A". A timely Petition for Rehearing was filed by petitioners and is appended hereto as Appendix "D". Thereafter, the Court denied the Petition without an opinion. A copy of the Order denying the Petition is appended hereto as Appendix "B". On February 29, 1972, petitioners' Motion for Stay of Mandate was filed with the Clerk of the United States Court of Appeals for the Fifth Circuit. The Court granted petitioners' Motion for Stay of Mandate on March 8, 1972. A copy of said Order is appended hereto as Appendix "E". The Opinions referred to above have not yet been officially reported.

The Court of Appeals for the Fifth Circuit had jurisdiction to decide the Federal question here sought to be reviewed for the reason that petitioners were convicted in the United States District Court for the Middle District of Georgia, and they subsequently filed their appeal as a matter of right.

STATEMENT OF FACTS

On the basis of an informer's tip, an agent of the Americus Alcohol, Tobacco and Fire Arms Division of the Internal Revenue located an illegal whiskey still on William Cowan's property. Cowan was an alleged co-conspirator not indicted. Before the agents confiscated the non-tax paid whiskey it was removed to the premises of still another alleged co-conspirator of petitioners, William Denniston. (R. 44) The agents searched the premises of William Denniston pursuant to a search warrant and seized a large quantity of non-tax paid liquor along with six small notebooks and two checks which the government introduced as evidence against the petitioners. (R. 45)

The government produced four (4) witnesses at the trial who stated that at one time or another they were allegedly engaged in the whiskey business wth the appellant Spencer Walker. The first witness was William Denniston who testified that in 1965 he and the appellant entered into a business agreement whereby the appellant, Walker, would supply Denniston with non-tax paid whiskey for resale to Denniston's customers. (R. 137-40) He also stated that the appellant agreed to pay half of any fine resulting from the operation of the whiskey still. (R. 138) These transactions allegedly took place in Fitzgerald, Georgia. This arrangement lasted until Christmas of 1966. (R. 142) At that time Denniston stated that he became scared and that the appellant, Ruben Ivery, Walker's associate, picked up the whiskey, and he ceased operations at this time. (R. 142) Sometime after Christmas in 1965 Walker allegedly rented from William Denniston an old building located on the Denniston property. The building was formerly used for a body shop. Appellant allegedly paid $10 per week rent. In

September of the next year Mr. Denniston testified that he moved to Sylvester, Georgia, and would collect the rent on the week ends. According to Denniston he moved back to Fitzgerald in the summer of 1968. (R. 142-45) After Denniston returned to Fitzgerald he stated that the appellant gave him a job delivering whiskey to his customers. (R. 149) This arrangement between Denniston and Walker allegedly continued for almost a year. (R. 178) In June of 1969, Denniston states that he entered into a new agreement with Mr. Walker to operate a whiskey still, together with another man named Charlie Monk. (R. 179) Mr. Denniston testified that he operated this still for approximately five weeks. (R. 180) The liquor made at this still was allegedly stored in the old building that Walker rented. (R. 181)

About five months after Denniston had ceased the still operation described above, he, Charlie Monk and Spencer Walker allegedly, again, entered into a different agreement to operate the whiskey still. The State Revenue Agents, however, arrested Denniston and Charlie Monk at the still site before they were able to actually process the first batch of liquor. (R. 182, 289) Denniston was not prosecuted for maintaining this still since Charlie Monk took the entire blame for its operation. (R. 182) William Denniston further stated that in exchange for Charlie Monk taking the entire blame, he paid half of the $1,000 fine and the appellant, Walker, paid the other half. (R. 183) This still operation was destroyed pursuant to State statutes and by State agents. Charlie Monk was prosecuted in a State Court proceeding. (R. 296) Denniston testified that this still was furnished by the appellant, Spencer Walker. (R. 179-80) He also stated that the appellant Ivery assisted Walker in carrying on the illicit whiskey business in various ways. (R. 141)

The government introduced three (3) other witnesses against the appellants at the trial all of whom testified that they had been involved in an illegal whiskey business with the appellants. These witnesses were Robert Bragg, Charles Monk and William Cowan. The testimony of these alleged co-conspirators was offered as evidence against petitioners to prove one continuing conspiracy as charged in the indictment. However, the record reflects that these witnesses testified as to several separate and distinct alleged conspiracies.

MANNER IN WHICH FEDERAL QUESTION WAS RAISED

The Federal question sought to be reviewed was raised in the trial court by a timely Motion for Judgment of Acquittal. The Court denied the Motion. (R. 560-62) On Appeal to the Court of Appeals for the Fifth Circuit, petitioners contended that the trial court committed reversible error when it denied their Motion for Judgment of Acquittal enumerating several separate grounds. The Court of Appeals for the Fifth Circuit specifically ruled upon and determined the Federal question sought to be reviewed. Specifically, the Court held that "Even if we assume that a variance existed in this case, it could not affect the substantial rights of these defendants. *Monroe* v. *United States*, 234 F. 2d 49 (D.C. Cir. 1956) In addition, no danger that there could be a transference of guilt as expressed in *Kotteakos*, is present here." (See p. A3 Appendix "A")

ARGUMENT IN SUPPORT OF REASONS FOR ALLOWANCE OF WRIT

I.

The Decision of the Fifth Circuit Court of Appeals Affirming the Conviction of Petitioners Is Based upon an Erroneous Construction and Application of the Applicable Decision of This Court.

In *Kotteakos* v. *United States,* 328 U. S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), this Court enunciated the principle that the substantial rights of accused conspirators are affected when the indictment charges one general conspiracy and the evidence offered at trial proves several separate and distinct conspiracies, and that such a variance is so prejudicial to the defendants as to require a reversal of their conviction.

The opinion below clearly demonstrates an erroneous construction of the *Kotteakos,* supra, decision. The Court stated in its opinion ". . . whether a single conspiracy with different unlawful ends or multiple conspiracies were proved is immaterial in the context of this case since a review of the record convinces us that sufficient evidence was adduced to prove each defendant's connection with all three of the allegations of unlawful conduct." This statement is directly in conflict with this Court's proposed criteria to determine whether or not substantial rights have been affected.

This Court in *Kotteakos,* supra, proposed the following tests to determine when substantial rights are affected:

(1) ". . . the question is, not were they[1] right in

1. (they) referring to the jury.

their judgment, regardless of the error or its effect upon the verdict. It is rather, what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own,[2] in the total setting." at p. 1566, 90 L.Ed.

(2) "If, when all is said and done, the conviction (sic) is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . but if one cannot say, with fair assurance, after pondering all that happened *without* stripping the *erroneous action from the whole,* that the judgment was not substantially swayed by the error, *it is impossible to conclude that substantial rights were not affected."* (Emphasis added)

(3) "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is . . . *whether the error itself* had substantial influence." (Emphasis added) at p. 1567, 90 L.Ed.

(4) Each case must be decided on the *particular set of facts* and circumstances *before the reviewing court,* and the court should "not be governed in any rigid sense of stare decisis by what has been done in similar situations."

The facts and circumstances of this particular case should have been weighed by the Court below with particular attention to the effect the variance had on the jury in this particular setting and not relied upon an

2. referring to reviewing court judge.

analogy from another case. The Court below cited in its opinion *Monroe* v. *United States*, 234 F. 2d 49 (D.C. Cir. 1956), as authority for its proposition that appellants' rights were not substantially affected. This is squarely in conflict with this Court's direction to view each case on its own merits as to substantial rights.

This Court in *Kotteakos*, supra, recognized the very real danger of contaminating the minds of the jurors as indicated by the following quote from the *Kotteakos* opinion: "The dangers of transference of guilt from one to another across the line separating conspiracies subconsciously or otherwise, are so great that no one can say prejudice to substantial rights has not taken place." at p. 1571, 90 L.Ed.

The variance between the general conspiracy charged in the indictment and the proof of several separate conspiracies not charged, substantially affected the rights of petitioners and denied them due process of law as guaranteed by the Fifth Amendment of the United States Constitution.

The opinion of the Court below that petitioners' rights were not substantially affected is clearly contrary to this Court's Applicable Decision, *Kotteakos* v. *United States* as set out above.

CONCLUSION

Accordingly, this petition for writ of certiorari should be granted and the judgment of the Fifth Circuit Court of Appeals should be reversed and the sentence imposed upon petitioners should be vacated and set aside.

Respectfully submitted,

BYRD, GROOVER & BUFORD

.....

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.....

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Petition for Writ of Certiorari upon Mr. William J. Schloth, United States Attorney, by depositing three (3) copies of same in the United States Mail addressed to his post office address at P. O. Box U, Macon, Georgia 31202.

This 24th day of March, 1972.

.....

FLOYD M. BUFORD
Counsel of Record

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2165

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SPENCER O. WALKER and RUBEN IVERY,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Georgia

---

(January 11, 1972)

Before THORNBERRY, MORGAN and CLARK,
Circuit Judges.

PER CURIAM: The defendants appeal from a jury conviction based on a one count indictment charging a single conspiracy[1] to possess unregistered stills, to conceal

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*Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of N. Y.*, 431 F.2d 409, Part I (5th Cir. 1970).

1. 18 U.S.C.A. § 371 (1966).

a quantity of distilled spirits upon which the tax had not been paid, and to conduct a distillery business without having posted the requisite bond.[2] Urging reversal, the defendants press several points of error. We affirm.

First, the defendants complain of a fatal variance between the language of the indictment and the proof, *i.e.* they were charged with a single general conspiracy, whereas a trio of separate conspiracies were proven. Several other persons were named as co-conspirators but were not indicted. Defendants claim that the evidence showed, if anything, separate conspiracies each of which was engaged in by some but not all of the named members. However, whether a single conspiracy with different unlawful ends or multiple conspiracies were proved is immaterial in the context of this case since a review of the record convinces us that sufficient evidence was adduced to prove each defendant's connection with all three of the allegations of unlawful conduct. *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), requires that a variance affect substantial rights. The purposes of

---

2. The allegations of unlawful conduct as set out in the indictment are as follows:

(a) To unlawfully, wilfully, and knowingly have in possession and custody and under control certain stills and distilling apparatuses used and intended to be used for the distillation of distilled spirits set up without having same registered as required by law, in violation of Section 5601(a)(1), Title 26 U.S.C.

(b) To unlawfully, wilfully, and knowingly remove, deposit, and conceal a certain commodity for and in respect whereof a tax was imposed by the laws of the United States of America and which tax had not been paid, to wit: certain quantities of distilled spirits, the exact quantities being to the Grand Jurors unknown, with the intention to evade collection by the United States of America, of the tax imposed on such spirits, in violation of Section 7206(4), Title 26, U.S.C.

(c) To unlawfully, wilfully, and knowingly engage in and carry on the business of distillers of spirituous liquors without having given bond as required by law, in violation of Section 5601(a)(4), Title 26 U.S.C.

the "variance" rule are to apprise the defendants of the charges against them so that they may adequately prepare their defense, and to protect the defendants from another prosecution for the same offense. *United States v. Bullock*, ... F.2d ..... (5th Cir. 1971) [No. 71-1067, November 18, 1971]; *United States v. White*, ... F.2d ..... (5th Cir. 1971) [No. 71-143, October 19, 1971]. Even if we assume that a variance existed in this case, it could not affect the substantial rights of these defendants. *Monroe v. United States*, 234 F.2d 49 (D.C. Cir. 1956). In addition, no danger that there could be a transference of guilt as expressed in *Kotteakos*, is present here.

The defendants also assert that the evidence was insufficient to prove their guilt. The entire case for the government was built upon the testimony of several named, but not indicted, co-conspirators. This Circuit has held time and again that the testimony of co-conspirators may form a sufficient support to sustain a conviction. *See e.g., United States v. Clifton*, ... F.2d ..... (5th Cir. 1971) [No. 71-1752, September 10, 1971]. In the case *sub judice*, the declarations of the co-conspirators, if credited by the jury—as they must have been, form a firm enough foundation to uphold the verdict.

After his arrest defendant Walker was instructed by government agents to fill out three personal history forms. They did not inform him that they intended to use his handwriting on these forms to compare with the handwriting on documents previously seized. Walker characterizes this as trickery and asserts that it amounted to a deprivation of his Fifth Amendment right to be free from self-incrimination and his Sixth Amendment right to counsel. It is settled law in this Circuit that compelling an accused to give a handwriting exemplar does not violate the above rights. *See United States v. McGann*, 431 F.2d

1104 (5th Cir. 1970); *Schoenbrun v. United States*, 403 F.2d 57 (5th Cir. 1968). If such samples can be compelled, then we can perceive no prejudice of reversible dimensions in the fact that writings admittedly made by the defendant, but simply not specified as taken for graphological purposes, were later analyzed. Fed.R.Crim.P. 52 (a). *Cf. Graves v. Beto*, 424 F.2d 524 (5th Cir. 1970).

The defendants also assert that if they had complied with the federal liquor laws they would have subjected themselves to prosecution under state law. They cite *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697 (1968) and *Grosso v. United States*, 390 U.S. 85, 88 S.Ct. 722 (1968) to support their self-incrimination argument. This Circuit has repeatedly rejected this contention. *See Henderson v. Blackwell*, 436 F.2d 1081 (5th Cir. 1971) and cases cited therein.

The point of error concerning the prosecutor's remarks is without merit. The judgment of the district court is

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2165

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SPENCER O. WALKER and RUBEN IVERY,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Georgia

---

(February 29, 1972)

On Petition for Rehearing

(Filed February 29, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2165
Summary Calendar

D. C. Docket No. CR 1690
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SPENCER O. WALKER and RUBEN IVERY,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Georgia

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia; and was taken under submission by the Court upon the record and briefs on file; pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 11, 1972

Issued As Mandate:

APPENDIX "D"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2165

SPENCER O. WALKER and
RUBEN IVERY,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

Appellants' Petition for Rehearing

Comes now Spencer O. Walker and Ruben Ivery, Appellants in the above captioned case and, pursuant to the Federal Rules of Appellate Procedure, move the Court for a rehearing on the following grounds:

1.

That this Court has misapprehended and misapplied the Supreme Court's assessment of what constitutes substantial rights of an accused as outlined in *Kotteakos* v. *United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

This Court in its opinion stated that: ". . . whether a single conspiracy with different unlawful ends or mul-

tiple conspiracies were proved is immaterial in the context of this case since a review of the record convinces us that sufficient evidence was adduced to prove each defendant's connection with all three of the allegations of unlawful conduct." pp. 2 and 3, *United States of America* v. *Spencer O. Walker and Ruben Ivery*, No. 71-2165 (5th Cir. January 11, 1972). This Court then points out that *Kotteakos*, supra, requires that the variance must affect "substantial rights." Appellants agree with this statement from the *Kotteakos* decision. However, this Court overlooked or misapplied the standard the Supreme Court established in *Kotteakos* to determine whether or not substantial rights have been affected.

The Supreme Court in *Kotteakos*, supra, proposed the following tests to determine when substantial rights are affected:

> (1) ". . . the question is, not were they[1] right in their judgment, regardless of the error or its effect upon the verdict. It is rather, what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own,[2] in the total setting." at p. 1566, 90 L.Ed.
>
> (2) "If, when all is said and done, the conviction (sic) is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . but if one cannot say, with fair assurance, after pondering all that happened *without* stripping the *erroneous action from the whole*, that the judgment was not substantially swayed by the error,

1. (they) referring to the jury.
2. referring to reviewing court judge.

it is impossible to conclude that substantial rights were not affected." (Emphasis added)

(3) "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is . . . *whether the error itself* had substantial influence." (Emphasis added) at p. 1567, 90 L.Ed.

(4) Each case must be decided on the *particular set of facts* and circumstances *before the reviewing court,* and the court should "not be governed in any rigid sense of stare decisis by what has been done in similar situations."

The Supreme Court in *Kotteakos,* supra, applied the latter criterion when it declined to follow the previous decision of *Berger* v. *United States,* 295 U.S. 78, 82, 55 S.Ct. 629, 630, even though, as they readily admitted, the facts were on the surface identical. The Court stated that the substantial rights of the accused should be determined by looking at the natural effect of the error "for or against prejudice in the particular setting". The Court stated: "It follows that the *Berger* case is not controlling of this one, notwithstanding that abstractly considered, the errors in variance and instructions were identical in character." *Kotteakos,* supra, at p. 1567, 90 L.Ed.

Applying the principle enunciated in *Kotteakos,* above, the court should not have judged the substantial rights of the appellants by the standards of *Monroe* v. *United States,* 234 F.2d 49 (D.C. Cir. 1956) which it cited as authority for the proposition that appellants' rights were not substantially affected. According to *Kotteakos,* supra, the facts and circumstances should have been weighed by this court with particular attention to the effect of the variance in the particular setting of the case before them.

Monroe, supra, applied the tests laid down in *Berger* v. *United States,* supra, which the Supreme Court in *Kotteakos,* a subsequent decision, held that *Berger* should be limited to the particular facts and setting upon which it was decided.

The particular setting and circumstances in the present case show that the appellant was convicted upon oral testimony and physical evidence obtained from other persons alleged to have been co-conspirators of the defendants. The evidence presented at the trial showed that if the defendants were involved in a conspiracy with others, they were separate and distinct and not part of the common scheme or plan which amounted to a general conspiracy as alleged in the indictment. One witness, William Denniston, stated in substance that in 1965 he entered into a conspiracy with the Appellant Walker (R. 137-40). He also stated that this agreement ended in 1966 (App. 142). The notebook which allegedly contained entries relating to the appellant's scheme to defraud the U. S. Government was seized from Denniston, an alleged co-conspirator, as well as certain checks allegedly pertaining to the sale of nontax paid whiskey (App. 152), both of which were presented as bearing the handwriting of Appellant Walker. This evidence certainly influenced the minds of the jurors and this error of presenting evidence of several distinct conspiracies without question prejudiced and detrimentally affected the substantial rights of the appellants.

The Supreme Court in *Kotteakos,* supra, recognized this very real danger of contaminating the minds of the jurors as indicated by the following observation: "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are *so great* that no one can say prejudice to substantial right has not taken place." at p. 1571, 90 L.Ed.

2.

This Court apparently overlooked its decision of *Nalls* v. *United States,* 240 F.2d 707 (5th Cir. 1957) which we cited in our brief, when it held that: "The point of error concerning the prosecutor's remarks is without merit. . ." at p. 4, *U. S.* v. *Spencer Walker and Ruben Ivery,* supra.

In the *Nalls* case, the prosecutor there used almost identical language and this Court held it was prejudicial to the defendant and required a reversal. The objectionable language in the *Nalls* case was presented at the conclusion of the Government's case as in the present case. The parallel between these cases can best be demonstrated by quoting from this Court's opinion:

> "As the Government's proof was concluded, its attorney stated in the presence of the jury: 'We have three other witnesses, one by the name of Ethel Pledger, and also Robert Ligon and Earl A. Stewart who have been subpoenaed by the Government. At this time we tender these witnesses to the Court and the attorney for the defendant. The reason the Government will not put them on, we feel that their testimony might be cumulative, and we do not care to'—." at p. 710.

At this point counsel for the defense objected to these remarks being made before the jury.

As pointed out in our brief this Court stated in *Nalls* supra, that: ". . . such a procedure is inherently unfair to the defendant. . . To proffer the witnesses before the jury under the circumstances here disclosed is to challenge the defendant to use them, or to risk the probability that the jury will hold it against him if he fails to put them on the stand."

In the present case the language used by the Government closely resembles the prohibited statements made in *Nalls,* supra. In the present case the prosecutor stated:

> "Mr. Knight: Your Honor, before resting if we may make a statement we do have some other witnesses that are available if the Defendants would like to call them. We feel that their testimony at this time would be repetitive of what has already been said by the previous witnesses in numerous instances. We'll be happy to furnish them with the names of these people if they so desire to call them.
>
> Mr. Schloth: They're outside.
>
> The Court: In other words, you have other witnesses who are available who can be put on the stand by the Defendants if they want to put them on the stand?
>
> Mr. Knight: That's right.
>
> The Court: Is that what you're saying?
>
> Mr. Knight: That's right.
>
> The Court: Do you want to call their names so that the Defendants' counsel will know who they are.
>
> Mr. Knight: We have a Miss Susie Clay from Fitzgerald and Mr. Gene Hunter; and I believe those are the only two, Your Honor.
>
> The Court: All right, they're available if the Defendants want them.
>
> Mr. Reinhardt: Your Honor, I think that I should respond to the offer of the Government and say, first, that unless I can see the statements of the witnesses that they have given the Government, I can't put them on the stand; and, secondly, the Government witnesses

in this case refused to talk to Mr. Walters and I about this; and, while it might sound very fair for the Government to offer us their witnesses, I can't, of course - - - . . .

Mr. Reinhardt: Well, if the Government would let us read their statements, then we can make a decision.

The Court: Well, I have no control over that either. I can't make anybody talk to anybody and I can't require the Government to give you copies of the statements they have, just like I couldn't require you to give the Government copies of anything you've got. I can't control anything like that. (App. 381-383)" p. 20, *U. S.* v. *Walker,* supra.

After comparing the language used in the present case to that used in *Nalls,* supra, it is clear that this Court overlooked its prior holding.

Even though a Motion for Mistrial was not made at the time prejudicial remarks were made by the Government attorney, the remarks were patently prejudicial on their face, and constituted plain error which affected substantial rights of the appellants. Rule 52(b), Federal Rules of Criminal Procedure requires that such plain error be noticed by the appellate courts.

WHEREFORE, Appellants pray that this their Petition for Rehearing be inquired into and that same be

granted and that the decision of the Trial Court in this case be reversed.

Respectfully submitted,

BYRD, GROOVER & BUFORD

.....

FLOYD M. BUFORD
Attorney for Appellants

165 First Street
Macon, Georgia 31202

.....

JEAN BEENE
Attorney for Appellants

Post Office Box 782
Macon, Georgia 31202

CERTIFICATE OF SERVICE

I, FLOYD M. BUFORD, Attorney for the Appellants, do hereby certify that I have this date served a copy of the foregoing Appellants' Petition for Rehearing on Mr. William J. Schloth, United States Attorney, by mailing a copy of same to his post office address at P. O. Box U, Macon, Georgia 31202.

This the ..... day of ....., 1972.

.....

FLOYD M. BUFORD
Attorney for Appellants

APPENDIX "E"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk
March 8, 1972

Mr. Bob Reinhardt
Attorney at Law
209 E. Fourth
Tifton, Ga. 31794

Mr. Floyd M. Buford
Attorney at Law
165 First Street
Macon, Ga. 31202

No. S71-2165—U.S.A. v. Spencer O. Walker and Ruben Ivery

MANDATE STAYED TO: March 30, 1972

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

Edward W. Wadsworth, Clerk
By /s/ Susan Le Brun
Deputy Clerk

enc. (LETTER ONLY)
cc: Mr. Ronald T. Knight

SUPREME COURT, U. S.

MAY 18 1972

MICHAEL RODAK, JR., CLERK

No. 71-1228

In the Supreme Court of the United States

OCTOBER TERM, 1971

SPENCER O. WALKER and RUBEN IVERY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1228

SPENCER O. WALKER and RUBEN IVERY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted in the Middle District of Georgia of conspiracy to defraud the United States by the manufacture and transportation of non-tax-paid whiskey, in violation of 26 U.S.C. 5601 and 7206. Walker was sentenced to imprisonment for four years and Ivery to imprisonment for two years. The court of appeals affirmed *per curiam* (Pet. App. A).

Petitioners' sole contention is that there was a fatal variance between the indictment and the proof in that, although the indictment charged one conspiracy, the proof allegedly showed several conspiracies relating to petitioners' involvement in the whiskey business with different individuals. The court of appeals correctly rejected this contention on the ground that the evidence showed that petitioners were involved in all three of the allegedly separate conspiracies. See *Canella* v. *United States*, 157 F. 2d 470, 478-479 (C.A. 9), where the court affirmed the conviction of a defendant who had participated in all the multiple conspiracies which had been charged as a single conspiracy count while reversing with respect to those defendants who were involved in only some of the separate conspiracies.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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